No. 377

Office - Supreme Court, U. S.
OCT 2 1952

Supreme Court of the United States

OCTOBER TERM, 1952.

GAYNOR NEWS COMPANY, INC.,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

BANDLER, HAAS & KASS,
Attorneys for Petitioner.

HARRY S. BANDLER,
JULIUS KASS,
MAURICE H. GOETZ,
Of Counsel.

Dated: September 23, 1952.

BLEED THROUGH- POOR COPY

TABLE OF CONTENTS.

BLURRED COPY

Table of Cases.

BLEED THROUGH– POOR COPY

Supreme Court of the United States

OCTOBER TERM, 1952.

GAYNOR NEWS COMPANY, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Gaynor News Company, Inc., respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the Order entered by said court on July 8, 1952, in case No. 22297 on the docket of that court.

Jurisdiction.

Jurisdiction to issue the writ requested is provided for in Title 28, U. S. Code, Sec. 1254(1).

The particular facts in this case also place it within the purview of Supreme Court Rule 38, par. (5b), which recognizes the jurisdiction of this Court to accept cases in which a Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

BLURRED COPY

Statement of the Case.

There is little dispute as to the underlying facts in this matter. The main issues revolve about the proper statutory construction to be given Sec. 8(a)(3) of the Labor-Management Relations Act of 1947. The pertinent language in this section provides:

> "Sec. 8(a). It shall be an unfair labor practice for an employer——
>
> • • • • • •
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:"

The clear intention of this provision, manifest by the language employed, is to prohibit encouragement or discouragement of union membership by discrimination in regard to conditions of employment.

Gaynor News Company, Inc. (hereinafter referred to as Petitioner), is engaged in the wholesale distribution and delivery of newspapers and periodicals. In 1946 it concluded a valid closed shop agreement with the Newspaper and Mail Deliverers' Union (hereinafter called "the Union"), restricting employment in Petitioner's business to members of the Union. However, employment of non-union employees was permitted pending such time as the Union could supply union members. This union was for all practical purposes a closed union and was not accepting new members except for "legitimate issue" of members. The non-union employees, whose rights and status are here involved, did not have tenure in that they could be validly discharged any time the Union supplied members to replace them. Obvi-

BLEED THROUGH– POOR COPY

ously, they were not covered by the closed shop contract, since, as with every closed shop contract, it was applicable to union members only.

The specific charge in this matter was brought by a single non-union employee (hereinafter referred to as "Loner"), to the effect that Petitioner was guilty of encouraging Loner's membership in the Union by its failure to pay him a certain amount of retroactive pay received by Petitioner's permanent union personnel under its contract and a vacation benefit which Petitioner voluntarily granted its regular employees. (Voluntarily in the sense that it was not required by the collective bargaining agreement. Obviously, in granting such a gratuitous benefit, the employer weighed the cost in terms of maintaining harmonious labor relations with its permanent personnel.) A complaint issued on the basis of the charge in February, 1949, and an "amended complaint" issued in June, 1950, which raised, for the first time, the question of the invalidity of the 1948 contract. A hearing was held before Trial Examiner Asche on July 17-19, 1950, and the Trial Examiner found that Petitioner had committed the unfair labor practices specified in the charge and recommended that an Order issue extending the benefits claimed not only to Loner, but to all non-union employees similarly situated. The National Labor Relations Board issued its Order as recommended and the matter was taken to the United States Court of Appeals for the Second Circuit on petition for enforcement. That court modified the Order of the National Labor Relations Board insofar as it forbade the Union to continue to enjoy representative status and conduct negotiations on behalf of its employee members. The remainder of the Order was directed to be enforced as made.

BLURRED COPY

Neither the charge nor the complaint is supported by any evidence that Petitioner had the least interest or motive with respect to Loner's affiliation or non-affiliation with the Union. Petitioner offered to show that Loner had long since applied for membership, had been denied such membership, and was, in fact, ineligible for such membership,[1] and this testimony was barred. The Board and the United States Court of Appeals for the Second Circuit held that the purpose and effect of the Petitioner's actions were immaterial and that it was guilty of unfair labor practices, on the ground that the conduct here involved was "inherently" conducive or had a "natural tendency" toward increasing union membership.

The Petitioner's position is that since it was not contractually bound to pay extra benefits to its relatively temporary non-union employees, in its business judgment it did not do so. The factors influencing its choice clearly had no relation to any inclination on Petitioner's part to see Loner become a member of the Union, nor to the possibility that such membership would occur. On the contrary, under the peculiar circumstances, Petitioner would have been much more interested in keeping its temporary non-union personnel in *statu quo* since they would thereby continue to be contractually ineligible for extra benefits.

It is not questioned that the Union and Petitioner were at all times relevant to this proceeding at "arms length" in the most traditional employer-union sense. The bitterness of the protracted negotiations preceding both the 1946 and 1948 contracts was undisputed and not contro-

[1] (G. A.—4, 5, 6, 7, 19). Hereinafter Petitioner cites briefs and Appendices of the respective parties as B. B. and B. A. for Board's Brief and Board's Appendix, respectively (Petitioner below), and G. B. and G. A. for Petitioner's Brief and Appendix (Respondent below).

BLEED THROUGH– POOR COPY

verted. Thus the contention of the Board that Petitioner is guilty of assisting and encouraging membership in a union to which it has been bitterly opposed is anomalous. The decisions of the Board and the United States Court of Appeals for the Second Circuit find the Petitioner guilty of encouraging membership in a union it strongly opposes and which clearly did not wish the membership allegedly sought to be encouraged.

Questions Presented.

1. Can an employer be held guilty of an unfair labor practice under Section 8(a)(3) of the Labor-Management Relations Act of 1947, which provides that he may not encourage or discourage membership in any labor organization by discrimination in regard to any terms or conditions of employment, where there is absolutely no evidence to indicate that the acts complained of encouraged or discouraged such membership, or that that was their purposes?

2. The Labor-Management Relations Act of 1947 provides in Section 10(b) that "* * * No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *". It continues to state that the charge may be amended by the Board until such time as an order is issued. However, in view of the six months Statute of Limitations and the legislative history of this section of the Statute, can the Board still "amend" an original complaint, so as to add new charges long after the six months' period has expired?

BLURRED COPY

Reasons Relied on for Allowance of Writ.

It is submitted that the Circuit Court of Appeals for the Second Circuit has determined an important question of statutory construction in a manner in conflict with decisions of other Circuit Courts of Appeals.

This decision holds an employer guilty of violating a statute which forbids it from encouraging Union membership, in spite of the fact that there is overwhelming evidence to the effect that, under the peculiar circumstance of this case, the employer could not possibly have further encouraged such membership; that it had no motive to desire such a result, but rather a far greater motive to prevent it; and finally, that the employer's conduct did not have the forbidden result.

The statute in its pertinent language provides:

> "Section 8. It shall be an unfair labor practice for an employer * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage membership* in any labor organization." (Italics supplied.)

The clear language of the statute makes the particular offense *encouragement* or *discouragement* of membership in any labor organization. The interpretation of the Second Circuit places emphasis on the word "discrimination" alone rather than on "* * * discrimination * * * to encourage or discourage membership in any labor organization". Its decision holds that certain types of discrimination are "inherently conducive to increased Union membership", and that the mere act of discrimination alone is sufficient to render the employer guilty of violating this section of the

BLEED THROUGH– POOR COPY

Act. It is, therefore, in conflict with the decisions of other Circuit Courts of Appeals on this same subject, which hold that the alleged discrimination must be made with the *intention* of encouraging or discouraging Union membership, and that it must have that result.

The Circuit Court of Appeals for the Third Circuit has held that an employer cannot be held guilty of an unfair labor practice under this Section of the Statute unless his acts had the *purpose* and *effect* of encouraging or discouraging Union membership. In that case, as in the one at hand, no act of the employer could have constituted a further inducement to Union membership, since the employees affected had already done everything in their power to obtain such membership and were held to be ineligible by the Union. That case involved the same contract and the same Union as is here involved. *National Labor Relations Board* vs. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (1951).

The Circuit Court of Appeals for the Eighth Circuit followed that decision and went on to say:

> "Nothing that respondent-company might do by way of discriminating against him [the employee] could be said proximately to encourage him to join a Union which was impossible for him to join. *There can be no violation of this Statute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization. National Labor Relations Board* vs. *Del E. Webb Construction Company et al.*, 196 F. 2d 702, 706 (1952). (Italics supplied.)

In another case involving the construction of the same statute, that Court reaffirmed and followed the *Reliable* case, *supra*, and held discrimination as to any term or condi-

BLURRED COPY

tion of employment was not sufficient of itself to be a breach of Section 8(a)(3), but it must have the purpose and effect of encouraging or discouraging membership in a Union. *National Labor Relations Board* vs. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America etc. Local Union No. 41, A. F. of L.*, 196 F. 2d 1 (1952).

Thus we find that of the four cases directly in point, two decisions in the Eighth Circuit and one decision in the Third Circuit are all diametrically opposed to the holding in this case in the Second Circuit. In view of the divergent views held by the Circuit Courts of Appeals on the construction of this important Federal statute, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BANDLER, HAAS & KASS,
Attorneys for Petitioner.

HARRY S. BANDLER,
JULIUS KASS, and
MAURICE H. GOETZ,
Of Counsel.

Dated: September 23, 1952.

BLEED THROUGH– POOR COPY

Supreme Court of the United States

OCTOBER TERM, 1952.

GAYNOR NEWS COMPANY, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the United States Court of Appeals for the Second Circuit filed on July 8, 1952, is not yet officially reported. It is printed in full in the record (G. A., p. 22).

Jurisdiction.

As noted in the petition, jurisdiction is invoked under Title 28, U. S. Code, Sec. 1254 (1).

Statement of the Case.

The essential facts, concerning which there is no dispute, are fully set forth in the foregoing petition.

Specification of Errors.

It is respectfully submitted that the Circuit Court of Appeals for the Second Circuit erred:

1. In holding that an employer may be guilty of an unfair labor practice under Section 8(a)(3) of the Labor-

BLURRED COPY

Management Relations Act of 1947, which forbids employers from encouraging or discouraging union membership, where there is no proof to substantiate the decision. The finding is based on the grounds that the employer's acts were "inherently conducive" toward encouraging union membership in spite of the fact that there is overwhelming evidence to the effect that the employer had no such purpose nor did his acts have such effect. The employees involved had made every possible effort to become union members prior to the alleged discrimination, however, under the constitution and by-laws of the Union these employees were ineligible for such membership and no act of the employer could have further increased their desire for membership or their opportunities for admittance. Furthermore, the entire history between this employer and the union has been one frought with antagonism and bitter controversy and it is an established fact that the employer suffers financially whenever a new employee is admitted to the Union. In the light of that background it is anomalous to accuse this employer of encouraging membership in the Union.

2. In determining that the National Labor Relations Board may "amend" a complaint more than six months after a charge has been filed so as to change the complaint in both form and substance.

Statutes Involved.

The statutes involved are: (a) Sec. 8(a)(3) of the Labor-Management Relations Act of 1947 which states:

> "it shall be an unfair labor practice for an employer * * * by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization * * *."

BLEED THROUGH– POOR COPY

(b) Sec. 10(b) of the Labor-Management Relations Act of 1947 which provides "* * * no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of a charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *."

SUMMARY OF ARGUMENT.

POINT I.

The Board has failed to prove that petitioner violated Section 8(a)(3) of the Act.

(a) The Board has failed to prove that petitioner discriminated against Loner within the meaning of the Act.

(b) The Board has failed to prove that petitioner encouraged union membership within the meaning of the Act.

POINT II.

The Board's order is not entitled to enforcement as to employees who are not named in the complaint and who did not file charges.

BLURRED COPY

ARGUMENT.

POINT I.

The Board has failed to prove that petitioner violated Section 8(a)(3) of the Act.

(a) The Board has failed to prove that petitioner discriminated against Loner within the meaning of the Act.

In *National Labor Relations Board* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (1951) which involved the identical questions raised here, dealing with the identical collective bargaining contracts and with the identical situation with respect to non-union employees, the Third Circuit found no "discrimination" within the meaning of the Act. In addition, the Court found no "encouragement of union membership" as required by the Act; as that Court cogently stated:

> "• • • The employer did not deprive its non-union workers of anything to which they were entitled. They had been given their full wages during the period which later became subject to Union retroactive pay. There was never any arrangement with them then or later that they would receive further payments for that time should a new contract with an increased wage scale be agreed upon. If they had been members of the Union, they would have been within the contract and would have received the extra money. It was not the fault of the employer that they were unacceptable as Union members. The Union employees were so paid because that was the employer's contract obligation to them. The non-Union employees made no attempt to correct the anomalous situation either by petitioning the Board for an election of a bargaining agent or any other

BLEED THROUGH– POOR COPY

> action under the Act or in the State Courts with the exception of this proceeding. *Under all the facts we fail to see the existence of discrimination.*" *Supra,* at page 551. (Italics supplied.)

That case is identical in every point of substance to the one now under consideration. The collective bargaining agreement involved in the instant case was negotiated by the Suburban Wholesalers' Association representing many news delivery companies engaged in the same type of work. Both *Reliable Newspaper Delivery, Inc.* and *Gaynor News Company, Inc.* are members of this Association, and therefore operated under exactly the same contract. They were both represented by present counsel. The same Union was involved and the same employment practices existed. The Third Circuit held in the *Reliable* case that that company was *not* guilty of discrimination within the meaning of the Act for indulging in the very same practice for which the Second Circuit found Gaynor News Company, Inc. guilty of the unfair labor practice of discrimination. In this case, the petitioner was entitled to rely upon its collective bargaining contract as the basic arrangement between itself and its employees. Those non-Union employees to whom the contract did not apply, except to provide that their employment was terminable at will (See B. A., p. 123), retained a status common to the majority of employees everywhere—a non-contractual employee/employer relationship. They lost nothing to which any rule of law, wage statute or individual contract entitled them. Having accepted the benefits of their employment with the petitioner and being aware from the start that their employment status was terminable at will (G. A., pp. 5, 6, 7, 8, 9), these employees can hardly be said to have suffered the traditional oppression which Section 8(a)(3)

BLURRED COPY

sought to relieve, to wit: coercive measures such as discharge, demotions or other disciplinary action designed to inhibit their freedom of choice.

Certainly not all disparate treatment is "discrimination" under the Act, but only such disparate treatment as has the purpose and effect of bringing pressure to bear upon the free selection of a bargaining representative. *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103 (1937).

The type of benefit which the Board claims for these non-Union employees was in the nature of a very special concession; retroactive pay based on the timing of a collective bargaining contract with that of an affiliated industry dealing with the same Union, and vacation benefits based upon a continuing contractual relationship.[2] The denial of such benefits to temporary personnel who are not members of the bargaining Union is not so unreasonable as to constitute unlawful discrimination. This petitioner was under no duty to equalize all benefits paid to its employees; neither the Wagner Act nor the Labor-Management Relations Act purport to be a fair labor standards act.[3]

The Board does not attempt to distinguish this aspect of the *Reliable* case, *supra,* except to say that a different proportion of Union and non-Union employees existed in

---

[2] Paragraph 19-a of the 1946 contract (B. A., p. 125) used the July 17th date upon which retroactive pay was computed, because the Union's contract with the Publishers, the affiliated industry upon which this petitioner's contract with this Union is associated, expired on that date.

[3] The *reductio ad absurdum* is reached when benefits voluntarily conferred by this employer are considered. As a matter of good personnel relations with its permanent employees, this employer voluntarily credited them with an extra week of vacation pay. Is it to be penalized for this gesture by now being required to extend such payment to persons whom it did not contemplate in making its original offer?

BLEED THROUGH– POOR COPY

that case. The Second Circuit adopted the Board's views based on that distinction, although it is not clear what the effect of such a distinction might be. Indeed, throughout the Intermediate Report made by the Board's Trial Examiner and upon which the Board based its decision, the facts of the *Reliable* case, *supra,* are relied upon as "strikingly similar" (B. A., p. 34) and as authority for the ultimate findings of the Board in this case (B. A., p. 37). It was only upon the denial by the Third Circuit of enforcement of the Board's order in that case that the Board has suddenly found it distinguishable in fact (B. A., pp. 20-23). In any case, no distinction in fact suggested by the Board or by the Second Circuit bears in any way upon the argument made here that no discrimination as required by the Act has been proved.

In another case which involved an interpretation of Section 8(a)(3) the Circuit Court of Appeals for the Eighth Circuit had to deal with substantially similar questions to those involved in the case at hand. In that case the Board had found an employer guilty of violating Section 8(a)(3) in that he encouraged Union membership in one Union and discouraged it in another. The facts were as follows:

The employer had a collective bargaining contract with the International Union of Operating Engineers, Hoisting and Portable, Local No. 101 of Greater Kansas City and Vicinity, A. F. of L. The National Union's charter provided for the issuance of subcharters to local Unions for apprentice units and such a unit was formed at the site of one of the employer's construction projects. The apprentice unit was designated as 101-B. The Union's seniority rule in effect at the time provided that after an employee was a member of the apprentice unit for five years and qualified on the various types of equipment, he was then

BLURRED COPY

eligible for membership in the parent Union. However, in the event of layoffs all members of the parent Union were to have a preference to apprentices who must all be laid off before any member of the parent Union was discharged, regardless of the status of seniority on a project. The employer was compelled to reduce the size of his working force on this particular project, and therefore, according to the seniority rule a member of the apprentice unit was discharged. The Court found that under these circumstances the employer was not guilty of violating Section 8(a)(3). It stated at page 705, *supra:*

> "It must be borne in mind that he [the discharged employee] was not eligible to membership in Local 101 and he actively sought such membership prior to the instant here involved. In these circumstances we are unable to see how the discrimination against him as here charged encouraged membership in the respondent union or discouraged membership in Local 101-B. Pickard [the discharged employee] could scarcely have been encouraged to become a journeyman member of respondent union because under no circumstance could he become such member. His status so far as union affiliations were concerned, was fixed and could not be changed, at least by any act of the respondent company. It could scarcely be said that one may effectively be encouraged to do or not to do that which he is incapable of doing." *N. L. R. B.* v. *Del E. Webb Construction Co. et al.* (C. C. A. 8), 196 F. 2d 702 (1952).

The Court then goes on to cite the *Reliable* case, *supra,* with approval.

In still another case involving similar questions regarding the interpretation of Section 8(a)(3) the court held that an employer cannot be found guilty of encouraging

BLEED THROUGH– POOR COPY

or discouraging Union membership unless his acts were done for that purpose and that such acts had that effect. *N. L. R. B.* vs. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, etc. Local Union No. 41, A. F. of L.* (C. C. A. 8), 196 F. 2d 1 (1952). In that case the employer kept a seniority list from which men were assigned their work. One of the employees failed to pay his Union dues and according to a by-law in the Union charter thereby forfeited his standing on the seniority list. Accordingly, the Union requested the employer to reduce this man's seniority from 18th on the list to the bottom or 54th position, as a result of which the employee lost work on several occasions and instituted this charge. The Court states on page 3, *supra:*

> "The question confronting us therefore is whether there is substantial evidence to support the finding that such discrimination would or did 'encourage or discourage membership in any labor organization' in violation of Section 8(a)(3) of the Act. *Discrimination alone is not sufficient.*" (Italics supplied.)

Here the court also cites and follows the *Reliable* case, *supra,* and goes on to state on page 4, *supra:*

> "Having considered the record as a whole we can find no substantial evidence to support the conclusion that the discrimination in regard to the tenure or condition of employment of Boston [the employee] did or would encourage or discourage membership in any labor organization • • •."

In the court's analysis it stated that theoretically discrimination can be a violation of Section 8(a)(3) but only where there is substantial evidence to indicate that the act of discrimination was done with the intention of

BLURRED COPY

encouraging or discouraging Union membership and that it did or would have such effect.

(b) The Board failed to prove that petitioner encouraged Union membership within the meaning of the Act.

The petitioner is charged with encouraging membership in a labor organization to which it was and is fundamentally and bitterly opposed (G. A., pp. 12 and 13) and which organization has indicated clearly that it would not accept such membership in any event (G. A., pp. 3, 4, 5, 6, 7). It is accused of encouraging employees whose affiliation in the particular Union have never been of the least concern to the petitioner. As a matter of fact, it is clear from the circumstance of this case that such affiliation by any non-union employee would have represented a financial loss to petitioner, since he would thereby have been brought under the contract.

It is the petitioner's contention that this anomaly is the result of an erroneous interpretation by the Board of Sec. 8(a)(3) of the Act or more properly Sec. 8(3) of the Wagner Act.[4] That section as was relevant to this problem at the time of the alleged discrimination read as follows:

> "Section 8(a). It shall be an unfair labor practice for an employer * * * (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization: * * * "

[4] The Wagner Act applies to all questions of discrimination in this case since although the benefits of union members were paid after the effective date of the Taft-Hartley Act, they were based upon the contract arising prior to such date, and therefore fell within Section 102 of the Taft-Hartley Act which refers the question of unfair labor practices arising out of the performance of such contracts to the language of the Wagner Act.

BLEED THROUGH– POOR COPY

The Board contends as a legal proposition that once it has proved disparate treatment as between union and non-union employees, it has proved all that is required of Sec. 8(3) (Board's brief in the CCA, p. 8). In other words, the Board contends that the unfair labor practice prohibited by Sec. 8(3) is primarily "discrimination" and that "once it appears that an employer has, in fact, discriminated among his employees on the basis of their union membership" (Board's brief in the CCA, p. 8) the Act is satisfied.

But it is clear that the unfair labor practice defined in this section is "to encourage or discourage membership in any labor organization", while "discrimination" is merely a limiting method by which the unfair labor practice occurs (Compare Sec. 8(4) which specifically makes it an unfair labor practice to "discriminate").

The curious interpretation by which the Board has short-cut the language of Sec. 8(3) has not passed unnoticed by the commentators; Prof. C. C. Ward in his article "Discrimination under the National Labor Relations Act" (1939) 48 Yale L. J. 1152, states as follows:

> "In each of the sub-sections (1), (2), (4) and (5) the definition of the substantive unfair labor practice follows immediately the word 'to'; that is, the conduct which is made the basis of liability for violation of the act is described after the word 'to' in four out of the five sub-sections. There is no reason to believe that that is not also true in the fifth case, that of sub-section '(3)'. The unfair labor practice, sub-section (3) then—the basis of liability—is for an employer to 'encourage or discourage membership in a labor organization.' The words preceding 'to' in sub-section (3) must be given effect, then, as a condition to liability, not as a basis of liability. In other words, 'discrimination' is the proscribed

BLURRED COPY

> means of encouragement or discouragement of membership in a labor organization, but the prohibited conduct is the *encouragement or discouragement* of membership * * *. The reports of the Senate and House Committees made it clear that the proper short statement of sub-section (3) is that it 'prohibits encouraging or discouraging membership in a labor organization by discrimination', and not as the Board puts it, that it 'prohibits discrimination because of Union activity.' But after only one year of administration of the Act, the Board abandoned its original interpretation of the statutory provision and introduced an idea of its own."

The Second Circuit followed the principle espoused by Prof. Ward in the above article in *N. L. R. B.* v. *Childs Co. et al.* (C. C. A. 2), 195 F. 2d 617 (1952) and stated:

> ". . . the statute only prevents discrimination in regard to hire where the discrimination encourages or discourages membership in labor organizations. 29 U. S. C. A. Section 158(a)(3)."

Of course, the distinction between "discrimination" and "encouragement or discouragement" is ordinarily of slight significance since encouragement or discouragement of union membership may be assumed in the normal discrimination case. See Ward, *supra,* at page 1158. The phraseology of Section 8(3) becomes decisive only in the unusual situation, such as that presented here, in which discrimination is concededly not identified with any attempt by an employer to influence or coerce his employees in their selection of a bargaining representative.[5]

---

[5] *NLRB* v. *Link Belt Co.*, 311 U. S. 584 (1941), cited by the Board (Board's brief in the CCA, p. 11) makes the point that the "normal" case is to be distinguished from the "rare" case; this is precisely the point which the petitioner is attempting to establish here in the interpretation of §8(3).

BLEED THROUGH– POOR COPY

The requirements of proof become somewhat clearer when we shift the analytic emphasis to "encouragement or discouragement". The Board must prove that an employer intended to encourage or discourage union membership and that his action had that effect. In the normal case, these elements of purpose and effect run together in a single pattern of discriminatory activity in which the individual requirements of proof are obscured. In the unusual case, such as the one at hand, it is vital that they be precipitated out of the compound and separately applied.

The Board disputes that these requirements of proof exist independently, but this cannot be questioned in view of the almost unanimous concurrence of the Circuit Courts of Appeals. The following excerpts illustrate beyond any question of a doubt the necessity of sustaining the burden of proof that the discrimination alleged had both the *purpose* and the *effect* of encouraging or discouraging union membership.

> "Section 8(3) requires that the discrimination in regard to tenure of employment have both the purpose and effect of discouraging union membership." NLRB *v.* Air Associates, (CCA 2), 121 F. 2d 586, 592 (1941).
>
> "To make out a case under Section 8(3), it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization. This requires proof of both the purpose and effect of the action under review." *Stonewall Cotton Mills* v. *NLRB,* (CCA 5), 129 F. 2d 629, 632 (1942), cert. den. 317 U. S. 667 (1942).
>
> "It is perfectly clear that, in the discharge and refusal to reemploy, there was no intent to discourage membership in any labor organization, within the meaning of Section 8(3) of the Act." *NLRB* v. *Draper Corp.* (CCA 4), 145 F. 2d 199, 202 (1944).

BLURRED COPY

"Under this Section of the Act (§8(3)) to constitute the unfair labor practice of discrimination, the discrimination in regard to hire and tenure must have the purpose 'to encourage or discourage membership in any labor organization' ". *Western Cartridge Co.* v. *NLRB.* (CCA 7), 139 F. 2d 855, 858 (1943).

"The burden * * * was upon the Board to prove affirmatively and by substantial evidence that Bullard and Lingle were discharged because of union membership and activities and for the purpose of discouraging membership in the union." *NLRB* v. *Reynolds International Pen Co.* (CCA 7), 162 F. 2d 680, 690 (1947).

"The prohibition of §8(3), by its plain terms, extends to any discriminatory discharge the purpose and manifest effect of which is to discourage employee membership in a labor organization." *Wells, Inc.* v. *NLRB.* (CCA 9), 162 F. 2d 457, 459-460 (1947).

"It may be taken as settled that the right of an employer to discharge an employee, for cause or without cause, is the same whether the employee is or is not a member of the union. An employer may not, however, discharge or discriminate between employees, whether or not members of a union, for the purpose of discouraging membership in, or action on behalf of, a union." *NLRB* v. *Robbins Tire & Rubber Co.* (CCA 5), 161 F. 2d 798, 801 (1947).

It is therefore well settled that these requirements do exist and the question then becomes how each is to be applied to a particular situation and what type of evidence will satisfy such requirements and whether that evidence appears on the record.

The Board contends that since petitioner "discriminated against employees because they were not union

BLEED THROUGH– POOR COPY

members" (Board's brief in the CCA, p. 10) its intent to encourage membership is automatically established. Such a statement of the case in the light of the unique circumstance here involved is somewhat flippant and misleading. The petitioner did not discriminate against Loner *because* he was not a union member. Assuming that the petitioner discriminated, it did so because in its sound business judgment it felt that Loner was not entitled to the particular benefit involved and that since the petitioner was not obligated contractually or otherwise to pay him such benefit, they did not do so. That is quite different from the cases cited by the Board in its brief in the Second Circuit in which the employer made a deliberate selection in favor of a particular union which effectively bound his employees to become members of that union and to lose their jobs. Union membership was the specific center of a controversy and the unilateral action on the part of the employer determined the membership of his employees. Here, union membership as such, is not even remotely involved.

Similarly, the Board's argument that such proof of intent goes merely to the question of whether or not discrimination occurred (Board's brief in the C. C. A., p. 9) is completely inconsistent with the cases cited above in which the courts specified that it is "intent to encourage or discourage union membership" to which they refer. The notion that this is merely a method of establishing "good faith" on the part of an employer in mitigation of the remedy to be imposed against him (Board's brief, in the C. C. A., p. 10) is completely unsupported by the language of the Act. If the Act meant to provide for "good faith", it would have contained a good faith provision. Cf. Fair Labor Standards Act, 29 U. S. C. A., Section 216.

BLURRED COPY

The Board like any other litigant is entitled to rely upon objective facts to support an inference that a particular intent existed. But the presumption thus created is not an absolute, irrebuttable presumption. It exists only in the *absence* of evidence to the contrary. In this case petitioner attempted to introduce that evidence—that Loner's membership in the union had been sought and rejected, and that, under the circumstance the employer's action could not have intended to encourage a result which all parties knew to be impossible (G. A., pp. 3, 4, 5, 6, 7, 19). The Board's duty to come forward with the controverted evidence is apparent; in place of such evidence it makes the suggestion, unsupported by any evidence whatsoever that membership in the union might be achieved "by any one of a number of steps, from bribery to legal action" (Board's brief in the CCA, p. 23, fn. 23).

It is obvious why the Courts have required independent proof of intent where such proof is controverted. The unfair labor practice sections of the act are, in one sense, penal sections; violation of the rules they established may impose serious financial loss upon an employer and subject him to suffer restrictions in his future relationships with his employees. The imposition of these penalties certainly should require a showing of intent to violate the Act and to obtain the result prohibited by it. The words of the statute itself lend credence to this argument. This argument has been stated cogently by one of the commentators as follows:

> "The reason the employer's motive is decisive is plain. Imposed legal duties are usually a compromise between conflicting interests, the aggressor being privileged to invade the victim's interest to protect his own, so far as the law recognizes it. Hence, when

BLEED THROUGH– POOR COPY

> the aggressor is not actuated by a desire to protect a recognized interest, the basis for his excuse disappears. This philosophy is embeded in Section 8(3). If an employer discharges an employee to protect his interest in building up an efficient working force, he does not commit an unfair labor practice, even though the discharged employee is a union leader and organization is thereby set back. On the other hand, if the employer's action springs from a desire to discourage organization, the privilege is lost and the discharge is unlawful. Cox, *supra*, at 274."

On the evidence put forth in this case it cannot seriously be said that the petitioner *intended* to encourage a result which it knew could not occur and which, if it ever did occur, would not only have been a disadvantage to it, but would have involved certain financial loss.

3. The Necessity of Proving Effect.

To state that Section 8(a)(3) or its predecessor 8(3) do not require independent proof that encouragement of union membership actually occurred, is to state that a statute describing X as a crime does not require that the occurrence of X be proved. Nevertheless the Board contends that so long as a "necessary tendency" toward encouragement may be inferred, a violation of the Act has occurred although encouragement as such may not have occurred.

Again, as with the case of intent above, the Board is speaking the language of evidence, not of statutory interpretation. It may be true that where a "necessary tendency" may be inferred from the underlying facts the Board is entitled, in the absence of evidence to the contrary, to make an ultimate finding without the necessity of actually proving that a certain person or persons were actually

BLURRED COPY

encouraged. See *N. L. R. B.* v. *Engelhorn & Sons* (C. C. A. 3), 134 Fed. 2d, 553, 557 (1943). But where it can be shown that under all the circumstances encouragement of union membership is a logical absurdity all of the "necessary tendency" and "natural and probable effect" (B. A., p. 39) in the world cannot suffice to establish such encouragement as a finding of fact. As the Court in the *Reliable* case stated:

> "It would be necessary for us to completely close our eyes to the admitted facts in order to accept the Board's statement that the inevitable effect of the back wage payment was to encourage union membership because we know that membership in the union for non-union workmen was a practical impossibility" *Id.*, at page 552.

This situation may be compared with a similar one presented to the Second Circuit in *N. L. R. B.* v. *Air Associates* (C. C. A. 2), 120 Fed. 2d, 586 (1941). In that case an employer was charged with discriminately discharging two employees who were not union members. The Board argued that such discharges were made in order to create resentment against the union. That Court stated that it was impossible to infer from this that the discouragement of union membership had occurred; Judge Frank for the Court stated:

> "But we can discover no satisfactory explanation by the Board which would permit either a finding that the unlawful purpose had the effect required by the act or findings from which such an effect might reasonably be inferred" *supra*, at page 592.

Judge Frank later referred to the Board's finding in that case as creating a legal absurdity in *Perkins* v. *Endicott-*

BLEED THROUGH– POOR COPY

Johnson Corporation (C. C. A. 2), 128 Fed. 2d, 208 (1941) at pages 221-2, as follows:

> ". . . there was no evidence and no finding from which an inference could possibly be drawn that the discharge of employees (not known by the employer to be union members) in order to reinstate union employees, previously discharged, could conceivably discourage membership in a union, in violation of Section 8(3) of National Labor Relations Act, 29 U. S. C. A., Section 158(3)."

In the past the Courts have consistently sought to analyze the actual effect an employer's action may have upon union membership. Thus in *Quaker City Oil Refining Corporation* v. *NLRB,* 119 Fed. 2d, 631 (1941), the Court stated as follows:

> "It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the union." *Supra,* at page 633.

This language was approved and applied in *N. L. R. B. vs. Public Service Transport,* 177 F. 2d 119 (1949).

The petitioner offered to prove that Loner had applied for union membership long before the question of retroactive pay arose, had been unsuccessful in achieving that goal and was, in fact, ineligible for such membership. Assuming this to be true the Board is in the position of accusing respondent of encouragement, where no encouragement was necessary and of encouraging a result which upon the offered evidence, was impossible of achievement. To find the unfair labor practice of encouragement under such circumstances would be a complete *non sequitur.*

BLURRED COPY

POINT II.

The Board's order is not entitled to enforcement as to employees who are not named in the complaint and who did not file charges.

Only one of petitioner's employees filed a charge against petitioner. Nevertheless, petitioner found itself, nearly two years later, faced with a complaint extending that charge to include, without further designation, all of petitioner's non-union employees. Petitioner contends that this is neither equitable nor is it authorized by the Act.

The Board blandly asks why petitioner should complain of the inclusion of all non-union employees when such inclusion occasioned no "hardship or surprise" to it. In the first place, petitioner has the right of any person or corporation to be required to defend only those charges which are actually brought against it. Nothing in the Act empowers the Board to solicit litigation on the part of individuals who, for whatever reason, have not themselves instituted proceedings or to initiate proceedings on its own initiative. *Consumers Power Co.* v. *NLRB,* (CCA 6) 113 F. 2d 38 (1940). Although the Board may enlarge upon unfair labor practices set out in the original charge, that is quite different from what the Board attempts to do here in actually initiating charges on behalf of employees who did not themselves either institute them or indicate on the Record that they wished such charges brought in their behalf. In the second place, a class suit of the type which the Board has apparently spun from air is a particularized form of action which, if it were to be part of the Board's arsenal, should have been specifically authorized by Congress. (See Federal Rules of Civil Procedure §23.)

BLEED THROUGH– POOR COPY

Furthermore, Congress indicated its intention to enable employers, after a six-months period, to draw the line against potential liability greater than that indicated by the charges as filed and mailed to them. A procedure by which a single charge filed by a single employee might serve as a bridge for countless other claims filed two or three years later would, in a vital respect, undermine Congressional intention in this regard and completely vitiates the purpose of § 10(b).

Finally, the nature of the testimony which petitioner sought to adduce and which the Third Circuit treated as highly relevant in the *Reliable* case was personal testimony of a sort which would certainly differ as between different non-union employees. Petitioner having raised the issue that, under the circumstances of this case, union membership was and is an illusory factor, the testimony of each such claimant is required. The burden was not petitioner's; the Board's presumption that petitioner's acts "tended to" encourage membership having been met, the burden was upon the Board to come forward with the evidence. This is precisely what the Board attempts to do by unsupported inference when it states in its brief that "frustrated applicants" for union membership "might seek to break down membership barriers by any one of a number of steps, ranging from bribery to legal action" (Board's brief in C. C. A., p. 23, fn. 23). Surely such proof, if it existed, would bring into controversy the testimony of many employees which testimony petitioner would have the right to anticipate. Thus, it is not true that the situation of all employees is "identical to that of the employee who filed the charge" and the failure on the part of the Board to define, name or produce those employees renders its Order unenforceable as to them.

BLURRED COPY

Conclusion.

In view of the diametrically opposed views held by the various Circuit Courts of Appeals in their interpretation of this important Federal Statute, it is submitted that a writ of certiorari should be granted.

Respectfully submitted,

BANDLER, HAAS & KASS,
Attorneys for Petitioner.

HARRY S. BANDLER,
JULIUS KASS,
MAURICE H. GOETZ,
Of Counsel.

Dated: New York, September 23, 1952.

BLEED THROUGH– POOR COPY